No. 15,197

IN THE

United States Court of Appeals

For the Ninth Circuit

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian,

Appellant,

vs.

AKIRA MORIMOTO,

Appellee.

Upon Appeal from the United States District Court for the Southern District of California, Northern Division.

OPENING BRIEF OF HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, APPELLANT.

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JURISDICTION.

The plaintiff-appellee sued the Attorney General, defendant-appellant, to recover property vested under the Trading with the Enemy Act (R. 6-7). A motion by the appellant to dismiss on the ground that, according to Section 33 of the Act, the action was brought too late was overruled on July 1, 1952 (R. 8-9). After trial the District Court entered judg-

ment for the appellee on April 20, 1956 (R. 35). The appellant filed a notice of appeal on June 11, 1956 (R. 36). The jurisdiction of this Court is invoked under United States Code, Title 28, Section 1291.

The "Memorandum and Order" of the District Court is not reported but is printed at pages 13-27 of the Transcript of Record. The Findings of Fact and Conclusions of Law are likewise not reported. They are to be found at pages 28-34 of the Transcript of Record.

STATEMENT OF FACTS.

The Attorney General vested the property in question under the Trading with the Enemy Act by Vesting Order No. 10267, dated December 9, 1947, and filed with the Division of the Federal Register on December 17, 1947 (12 F.R. 8452).[1] On or about October 17, 1950, the appellee's brother and agent filed with the Office of Alien Property, Department of Justice, a notice of claim for the property (R. 5), and in September, 1951, appellee himself filed a notice of claim (R. 6). The original complaint in this action was filed October 23, 1950 (R. 13), and the amended complaint September 28, 1951 (R. 7).

Akira Morimoto, the plaintiff-appellee, was born in Fresno, California, on April 18, 1912 (R. 42). His

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[1]By Executive Order No. 9788 (October 15, 1946, 11 F.R. 11981) the Attorney General succeeded to the functions and authority, including the authority to vest property, of the Alien Property Custodian.

parents were living in California at that time but were always nationals of Japan (R. 85).

The appellee lived in Fresno until 1924, with the exception of a period in 1917-1919 when he accompanied his parents on a trip to Japan (R. 43, 88), and went to school in Fresno (R. 31). His father owned the real estate in Fresno which is the subject of this suit, and a ranch, and had considerable sums of money due him (R. 86-87).

In 1924 appellee's father, who was in ill health, sold his business in Fresno and he and his wife returned to Japan, taking the appelleee with them (R. 86, 88). The parents never came back to the United States (R. 86). Two older brothers of the appellee remained in the United States, one being a partner in the firm which took over the father's business (R. 42, 86).

After their return to Japan the family settled in Hiroshima, where the father purchased a home (R. 53-55, 117). The appellee attended grammar school and high school in Hiroshima, being graduated from the latter in 1930 (R. 31). He remained at home for two years more, preparing to enter medical school (R. 55-56).

In 1932 when the appellee reached twenty years of age he became subject to compulsory military service under the Japanese law (R. 68, 75). He was a dual national, having United States citizenship by birth and being also a citizen of Japan under the law

of that country (R. 31).[2] In 1932, however, he was deferred from military service in order that he might complete his medical education (R. 68). In that year his father took out a passport for a business trip to the United States, but died before embarking (R. 87).[3]

From 1932 until 1938 appellee attended the Nippon Medical College in Tokyo, and he was graduated in March, 1938 (R. 136). While in school he boarded in Tokyo (R. 56-57), but returned to his home in Hiroshima for vacations (R. 58). He took his physical examination for the army in May, 1938, and passed it (R. 63), but he did not enter the service until October, 1938 (R. 65-66, 159). In the meantime he served as an interne at the Red Cross hospital in Tokyo (R. 66, 98-99).

Under Japanese law appellee had a choice: he could be drafted as a private or he could elect to apply for a commission as a medical officer, for what he could expect to be a shorter term of service (R. 75-76, 134). He also had a choice between entering the service in the Spring or Fall of 1938, and chose the latter (R. 62, 75-76).

At no time during this period did the appellee assert his American citizenship. He did not report to the consulate or register there as a citizen, and

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[2]His father had reported his birth to the Consul General of Japan as April 27, 1912, and it was entered in the family census record in Japan on June 7 of that year (R. 109). Apparently he never has had his name removed from that record.

[3]Thereupon appellee accepted the succession as head of the family (R. 108).

he did not offer his American citizenship as a reason for being excused from military service (R. 90, 160-161). As far as the record shows, the first time he claimed American citizenship was in 1949.

On the stand appellee explained his actions in 1938 by saying:

> . . . after I finished my education and I have to go to army that was the promise for my education, because if I object getting into the army, well, I couldn't have education either, so I have to omit—to get into army, but in that circumstances if I go to army two years and after that I will be free and I can be able to go any place. [R. 161][4]

The appellee entered the Japanese Army on October 10, 1938, as a Medical Officers Candidate. On December 15 of that year he was commissioned as a First Lieutenant in the Medical Corps (R. 125). His army service was in Manchuria, with the First Imperial Guards (R. 44-45, 67-68). On entering the service he swore allegiance to the Emperor (R. 89, 145-146). He was transferred to the reserves on December 15, 1940, and recalled to duty, continuing to serve in Manchuria (R. 125). On March 10, 1942, he was promoted to the rank of Captain (R. 125). His service continued until August 18, 1945, when he was captured by the Russians, who took him to

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[4]In a written statement he said, "I . . . thought that it would be more to my advantage utilize my capabilities and serve as a medical officer if I must serve in the Army either way, and so I volunteered in response to the Army's call for short-term medical officers in autumn" (R. 76).

Siberia as a prisoner of war September 9, 1945 (R. 45). He was repatriated to Japan on December 4, 1948 (R. 125).

The appellee was married in 1943, while in the army, and has two children, born in 1944 and 1946 (R. 47, 112). His wife lived with him for a while in Manchuria, and then returned to live with her parents in Tokyo (R. 47-48). The appellee did not register his children with an American consulate (R. 157-158).

During his army service in Manchuria and his imprisonment in Siberia the appellee continued to regard his family's place in Hiroshima as "home" (R. 73). On the Japanese official records Hiroshima was carried as his "permanent domicile" (R. 102-103).

As previously stated, appellee's father died in 1932. Appellee testified that his mother was killed in the Hiroshima explosion (R. 48). According to a paragraph in Exhibit C-1, which was omitted in printing (see R. 111), his mother died on November 15, 1945.

In regard to returning to the United States, the appellee testified that in 1924 when he went to Japan as a boy of twelve he had no particular intention, but that after he attended the medical school he gradually built up an intention to return to the United States (R. 51). Immediately thereafter he testified that the date of starting to form that intention was 1932, when he became twenty years old (R. 52).

When the appellee returned to Japan in 1948 he was in bad physical condition and was suffering from the results of malnutrition while a prisoner of war (R. 46). He registered in April, 1949, as a citizen with the American consulate in Yokohama (R. 46-47) and received an American passport in October, 1950 (R. 32), and he returned to the United States in December, 1950.

The real estate in question was inherited by the appellee in 1932 under the will of his father (R. 86-87, 92).[5] The Attorney General vested it in December, 1947.

The District Court on July 1, 1952, overruled appellant's motion to dismiss on the ground that the action was not timely under Section 33 of the Act (R. 8). After trial, that Court found that the appellee served in the Japanese Army in obedience to Japanese law; that his service after December 8, 1941, was involuntary; and that after that date appellee was not an "officer, official or agent of Japan within the Trading with the Enemy Act" (R. 32). It also found that appellee was not physically present in Japan from September 9, 1945 to December 4, 1948, and was not "resident within" Japan within the Act on the date of the Vesting Order, December 9, 1947 (R. 32). It found and concluded that the appellee was not an "enemy" as defined in the

[5]By stipulation of the parties the real estate was sold by the Attorney General subsequent to the commencement of this action, and the proceeds are held to abide the result, as well as certain accruals (R. 30).

Trading with the Enemy Act (R. 33, 34), and that the action had not been commenced after the time limited by Section 33 (R. 33). Judgment for the plaintiff was entered April 20, 1956 (R. 35). Notice of appeal was filed June 11, 1956 (R. 36).

SPECIFICATION OF ERRORS RELIED UPON.

1. That the District Court erred in overruling the defendant's motion to dismiss the complaint on the ground that the action was not instituted within the limitations of time prescribed by Section 33 of the Trading with the Enemy Act, and in holding that it had jurisdiction of this action.

2. That the District Court's Finding of Fact X that, "It is not true that this action was commenced after the time limited therefor by the provisions of Section 33 of the Trading wih the Enemy Act, as amended" (R. 33), was clearly erroneous as a matter of fact and of law, in that on the admitted and pleaded facts the property in suit "vested" in the Attorney General on December 17, 1947, no notice of claim was filed on behalf of the plaintiff-appellee before October 17, 1950, and this action was not instituted until October 23, 1950, while, under said Section 33, the last date by which an action could be filed was December 17, 1949.

3. That the District Court's Finding of Fact VII (R. 32) that the service of the plaintiff-appellee in the Japanese army after December 8, 1941, was in-

voluntary and that he was not on account of such service or otherwise an officer, official, or agent of Japan within the Act was clearly erroneous in that the uncontradicted evidence was that the plaintiff-appellee chose to become a commissioned officer and in that there was no evidence that he was coerced to military service.

4. That the District Court erred in holding that the plaintiff-appellee was not an "enemy" within the Act as an officer of the Japanese Government.

5. That the District Court's Finding of Fact VIII (R. 32) that the plaintiff-appellee was not resident within Japan from September 9, 1945 to December 4, 1948, or on December 4, 1947, was clearly erroneous in that the uncontradicted evidence was that from 1924 up to December, 1950, his home or domicile was in Japan.

6. That the District Court erred in holding that the plaintiff-appellee was not an "enemy" within the Act as an individual "resident within" Japan during the war.

7. That the District Court erred in entering judgment in favor of the plaintiff-appellee.

SUMMARY OF ARGUMENT.

Section 33 of the Trading with the Enemy Act prescribes the conditions of time imposed by Congress on the consent of the United States to be sued for the recovery of vested property and limits the

jurisdiction of the courts over such suits. As amended in 1948, Section 33 provided that suits for the recovery of vested property had to be brought by April 30, 1949, or within two years from the date of the vesting of the property, "whichever is later". The property claimed by the appellee vested in the Attorney General on December 17, 1947, so the two-year period expired December 17, 1949, which was the "later" date. The suit was not brought until October 23, 1950, so the Court did not have jurisdiction.

As part of a war statute, Section 33 was intended by Congress to apply during the war and to apply to all suits and claims; its application, unlike that of the ordinary statute of limitations, was not to be suspended or tolled during the war. The provisions of Section 33 afforded a reasonable opportunity to sue and were within the constitutional authority of Congress.

The Court also lacked jurisdiction because suits under Section 9(a) of the Act may be brought only by a person who is not an "enemy" within the Act, and plaintiff was an enemy as being "resident within" enemy territory during the war and as an "officer" of the enemy government.

Although appellee was physically absent from Japan from 1938 until 1948, on military service in the Japanese army, he remained domiciled in Japan, where his home was. Individuals "resident within" enemy territory are included in the Act's definition of "enemy" because their property is subject to the power of the enemy government as their persons are.

The appellee, domiciled in Japan and subject to its power, was "resident within" that country for purposes of the Act. So to hold is consistent with *Guessefeldt v. McGrath,* 342 U.S. 308, which dealt only with the question when individuals physically present in enemy territory are "resident".

Appellee was an "enemy" as a "resident" even though he was a citizen of the United States as well as of Japan because the Act's definition of "enemy" comprehends individuals "of any nationality". And, since he was "resident within" from December 8, 1941 until September, 1945, he continued to be an "enemy" even while he was a prisoner of war, because the plan of the Act is to treat as enemy-owned property throughout the war property which was so owned at any time during the war.

Appellee was also an "enemy" because as a commissioned officer in the Japanese army he came within the language of Section 2(b), which defines "any officer" of an enemy government as an enemy. On the evidence he entered the army pursuant to Japanese law requiring military service, but he was not subjected to actual coercion and made no effort to escape service, so his service in the army was "voluntary", after December 8, 1941, as before. Moreover, he was not compelled to become an officer, but chose to do so.

Vowinckel v. First Federal Trust Co., 10 F. 2d 19 (C.A. 9), is distinguishable, since Vowinckel appears to have been an officer of the German Red Cross and not of the German Government.

ARGUMENT.

1. THE DISTRICT COURT DID NOT HAVE JURISDICTION OF THE ACTION BECAUSE IT WAS BROUGHT AFTER THE TIME LIMITED BY SECTION 33.

As the Trading with the Enemy Act stood on the entry of the United States into World War II, it contained no statute of limitations on the time when suits for recovery of vested property might be brought. In 1946 Congress remedied this omission by adding Section 33, and in 1948 it amended that Section. As amended, the part of Section 33 which is immediately relevant here provides:

> No suit pursuant to section 9 may be instituted after April 30, 1949, or after the expiration of two years from the date of the seizure by or vesting in the Alien Property Custodian,[6] as the case may be, of the property or interest in respect of which relief is sought, whichever is later, but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9 or 32(a) hereof.[7]

This sets up two periods of limitation, after April 30, 1949, or "after the expiration of two years from the date of the . . . vesting in the Alien Property Custodian, . . . whichever is later".

The Vesting Order in this case was dated December 9, 1947, and was filed with the Federal Register

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[6]See footnote 1, *supra.*

[7]Section 33 was also amended in 1954 (68 Stat. 7 and 68 Stat. 767), but those amendments affect the filing of *claims,* not suits. We have reprinted the complete text of Section 33 as it stands now in the Appendix to this brief, *infra,* p. viii.

on December 17, 1947 (12 F.R. 8452). That was the date when it was effective and when the property "vested" in the Attorney General (Regulations of the Office of Alien Property, §504.1 (8 C.F.R., 1952 Revision; 17 F.R. 1082)). Two years from that date, or December 17, 1949, was the "later" date for purposes of Section 33. Appellee's claim was not filed with the Office of Alien Property until October 17, 1950 (R. 5), or after the expiration of the two years,[8] and the original complaint in this action was not filed until October 23, 1950 (R. 13), also after the two years. The "later" date being December 17, 1949, appellee's suit was nearly a year late and was barred by Section 33; "No suit pursuant to section 9 may be instituted . . .".

The amended complaint (R. 3-7) did not mention Section 9, but if this action is to be maintained at all, it must be under that Section, which provides the "sole relief and remedy" for claimants who would sue to recover vested property. Trading with the Enemy Act, Section 7(c) (*infra,* pp. ii-iii); *Becker Co. v. Cummings,* 296 U.S. 74, 79; *Clark v. Uebersee Finanz-Korp.,* 332 U.S. 480, 487; *Koehler v. Clark,*

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[8]It is assumed in appellee's favor that he may take advantage of the notice of claim filed by his brother and agent on October 17, 1950. Appellee himself filed a notice of claim September, 1951 (R. 6). The filing of a notice of claim is a condition precedent to a suit under Section 9(a) (*LaDue & Co. v. Brownell,* 220 F. 2d 468 (C.A. 7), certiorari denied, 350 U.S. 823), but a Section 9(a) suit is not a review of an administrative proceeding on the claim and need not await decision of the claim. *Draeger Shipping Co. v. Crowley,* 49 F. Supp. 215 (S.D.N.Y); *Duisberg v. Crowley,* 54 F. Supp. 365 (N.J.). And see, *Stoehr v. Wallace,* 255 U.S. 239, 246.

170 F. 2d 779, 780 (C.A. 9).[9] And this limitation of remedy to a suit under Section 9 is constitutional. *Tiedemann v. Brownell,* 222 F. 2d 802 (C.A.D.C.).[10]

The provisions of Section 33 are a condition of the consent of the United States to be sued and must be strictly complied with. See, *Banco Mexicano v. Deutsche Bank,* 263 U.S. 591, 602-603; and cf. *Edwards v. United States,* 163 F. 2d 268 (C.A. 9); *Anderegg v. United States,* 171 F. 2d 127 (C.A. 4), certiorari denied, 336 U.S. 967; *LaDue & Co. v. Brownell,* 220 F. 2d 468 (C.A. 7), certiorari denied, 350 U.S. 823. Being a condition to the consent of the United States to be sued, the requirement imposed by Section 33 goes to the jurisdiction of the court (*Cisatlantic Corporation v. Brownell,* 131 F. Supp. 406 (S.D.N.Y.), affirmed, 222 F. 2d 957 (C.A. 2); *Kroll v. McGrath,* 91 F. Supp. 173 (D.C.D.C.); *Pedersen v. Brownell,* 129 F. Supp. 952, 953 (Ore.)), and it may not be waived. *Cisatlantic Corporation v. Brownell, supra.* And see, *Wallace v. United States,*

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[9]Section 33 as amended in 1948 says "section 9", which means, in practice, Section 9(a), for Section 9(b) has been held inapplicable to World War II vestings. *Feyerabend v. McGrath,* 189 F. 2d 694 (C.A.D.C.). Section 9(b) was part of the World War I provisions for the return of enemy property. See, *Markham v. Cabell,* 326 U.S. 404, 418.

[10]Claims for the return of property may also be filed under Section 32 of the Act, but those proceedings are a matter of administrative discretion and are not subject to judicial review. *Tiedemann v. Brownell, supra; Hawley v. Brownell,* 215 F. 2d 36 (C.A.D.C.); *McGrath v. Zander,* 177 F. 2d 649 (C.A.D.C.). The same situation obtained during the World War I period with respect to action under Section 23 of the Act. *Kuttroff v. Sutherland,* 66 F. 2d 500 (C.A. 2); *Becker Steel Co. of America v. Cummings,* 95 F. 2d 319, 320 (C.A. 2), certiorari denied, 305 U.S. 604.

142 F. 2d 240 (C.A. 2), certiorari denied, 323 U.S. 712; *Anderegg v. United States, supra.* Cf. *Albert v. Brownell,* 219 F. 2d 602 (C.A. 9).

The language of Section 33, "No suit pursuant to Section 9 may be instituted . . ." is all-inclusive and must be taken to mean what it says, and the courts have construed and applied it at face value. In *Pass v. McGrath,* 192 F. 2d 415 (C.A.D.C.), certiorari denied, 342 U.S. 910, the property was vested in 1943, so the two years after vesting expired in 1945, and April 30, 1949, was the "later" date. Pass filed his claim in September, 1946, after the expiration of the two years, though before April 30, 1949, but he did not bring suit until October of 1949. The Court held that his suit was barred, saying:

> Since no suit and no claim was pending within two years after the property vested in the Custodian, the "later" date and the last on which suit could be brought was April 30, 1949. The claim filed with the Custodian in September, 1946, could not toll the two-year period that had expired in 1945.

To the same effect, see *Kroch v. McGrath,* 192 F. 2d 416 (C.A.D.C.), certiorari denied, 342 U.S. 927; *Hawley v. Brownell,* 215 F. 2d 36 (C.A.D.C.); *Cisatlantic Corporation v. Brownell, supra.*

So, in the present case the two-year period from vesting expired December 17, 1949; it was not reopened or tolled by the filing of a claim nearly a year later.

By a 1954 amendment (68 Stat. 7) Congress extended the time for filing *claims* to February 9, 1955, but significantly it did not change the limitation of time for suits. That amendment of one part of Section 33 retroactively authorized the filing of notices of claim in 1950 and 1951,[11] but it did not extend the time for filing suits. *Pedersen v. Brownell,* 129 F. Supp. 952 (Ore.); *Grabbe v. Brownell,* 140 F. Supp. 4, 6 (E.D.N.Y.). That is, the Congress made appellee eligible for a discretionary administrative return under Section 32(a)(2)(D) (*infra,* pp. v-vii), dealing with dual nationals, but did not restore the right to sue which he had lost by lapse of time.

Unlike the ordinary statute of limitations, which is not framed in contemplation of war (*Salvoni v. Pilson,* 181 F. 2d 615 (C.A.D.C.), certiorari denied, 339 U.S. 981), Section 33 is part of a statute addressed to the specific problems created by war. When it was first enacted in 1946 the United States was still at war with Germany and with Japan,[12] and when Congress amended Section 33 in 1948 to set April 30, 1949, as one of the alternative periods of limitation, we were still at war with those countries. The application of the ordinary peacetime statute of limitations

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[11]Under Section 33 as amended in 1948 the time for filing claims was also April 30, 1949, or two years from vesting (62 Stat. 1218).

[12]The state of war with Germany terminated with the Joint Resolution of October 19, 1951 (65 Stat. 45); the state of war with Japan with the 1951 Treaty of Peace, which was ratified March 20, 1952 (*U.S. Code Congressional & Administrative Service,* 1951, Vol. 2, pp. 2730-2742; *id.,* 1952, Vol. I, p. LXV). And see, *Commercial Trust Co. v. Miller,* 262 U.S. 51, 57; *National Savings & Trust Co. v. Brownell,* 222 F. 2d 395 (C.A.D.C.), certiorari denied, 349 U.S. 955.

is suspended during war because war denies enemies access to the courts. *Hanger v. Abbott,* 6 Wall. 532, 536, 538-539; *Brown v. Hiatts,* 15 Wall. 177, 184; *Osbourne v. United States,* 164 F. 2d 767, 768-769 (C.A. 2).[13] To apply that rule to Section 33 would be to say that in 1946 Congress enacted a statute of limitations which would come into effect it knew not when, and that, when in 1948 it put the date of April 30, 1949, in Section 33, it did not expect that date to have any effect.

The legislative history of Section 33 discloses that Congress enacted that Section with war conditions in mind and knew what it was doing. As originally approved on August 8, 1946, the Section provided that suits must be brought by two years after vesting or by August 8, 1948, whichever was later (60 Stat. 925). That provision Congress regarded as allowing a reasonable time within which litigation with respect to alien property matters should be brought to a close. Senate Report No. 1839, 79th Cong., 2d Sess., p. 3; House Report No. 2398, 79th Cong., 2d Sess., p. 9.

That Congress had in mind the conditions created by the war and resulting from it appears even more clearly from the history of the 1948 amendment. On March 25, 1948, Peyton Ford, The Assistant to the Attorney General, addressed a letter to the Speaker of the House of Representatives.[14] Mr. Ford pointed

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[13]The *Osbourne* case did not purport to approve any special period of suspension for prisoners of war; it applied to statutes dealing with the ordinary peacetime activities of the Government the rule of *Hanger v. Abbott, supra,* that such statutes of limitations are suspended during war.

out that many possible claimants had not been able to file claims in the time since August 8, 1946, and might not be able to file by August 8, 1948, because they were "displaced persons" or because the disorganization resulting from the war had prevented them from learning of or asserting their privileges under the Act. He proposed that the final date for filing claims be extended to July 31, 1949, and that, where the August, 1948, limiting date on claims and suits was retained, it should be changed to August 9, because the 8th was a Sunday. A bill embodying these suggestions was introduced. H. R. 6116, 94 Cong. Rec. 5994.

In response to this suggestion Congress amended Section 33, but the changes it made in the bill as originally introduced are significant as evidence of its intention to limit to a reasonable and fair extent all claims and suits. For both claims and suits the date of April 30, 1949, was substituted in place of July 31, 1949 and August 9, 1949 (the dates Mr. Ford had suggested), respectively. For each the alternative period of two years after vesting was retained. There is no explanation in the legislative history of the reasons for these changes (see 94 Cong. Rec. 8718), but the detailed and careful modifications and the departures from the form of the bill as introduced show that Congress had a definite intention and that that intention was to enact periods of limitations that

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[14]The letter is set out in Senate Report No. 1532 (80th Cong., 2d Sess.), pp. 1-2, and House Report No. 1843 (80th Cong., 2d Sess.), pp. 1-2.

would apply to all claims and suits under the Act, while making reasonable allowance for the dislocations and disabilities produced by the war. The 1948 amendment (62 Stat. 1218) was approved July 1, 1948, so the April 30, 1949, date gave all claimants at least a full ten-month period in which to sue. The retention of the alternative period of two years after vesting gave other claimants, like the appellee, more than ten months. On the facts of this case it gave the appellee until December 17, 1949. And the language, "No suit pursuant to section 9 may be instituted after . . ." shows that Congress intended to rule out all exceptions for which it did not specifically provide in the 1948 amendment.

For purposes of this branch of our argument we assume *arguendo* that the appellee is not an "enemy" within the Act and that he is within the protection of the Fifth Amendment. His former ownership of the vested property is conceded, but no matter how justifiable his claim, it could be cut off by a statute of limitations. *Kavanagh v. Noble,* 332 U.S. 535, 539. The power of Congress to impose a statute of limitations on suits against the United States is not open to question. *United States v. Garbutt Oil Co.,* 302 U.S. 528, 533-535; *Finn v. United States,* 123 U.S. 227, 231-232; *United States v. John K. & Catherine S. Mullen Benev. Corp.,* 63 F. 2d 48, 56 (C.A. 9), affirmed on another ground, 290 U.S. 89. The power of Congress to limit the time for suits against the United States is extremely broad. *Maricopa County v. Valley Bank,* 318 U.S. 357, 362. And a statute of limi-

tations that allows a reasonable time for commencing suit is not constitutionally objectionable. *Canadian Northern Ry. Co. v. Eggen,* 252 U.S. 553, 562. See also, *Chase Securities Corp. v. Donaldson,* 325 U.S. 304; *McCloskey & Co. v. Eckart,* 164 F. 2d 257, 260 (C.A. 5). When the Congress has plainly indicated its intention, as in Section 33, that intention must be given effect.[15]

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2. ON THE FACTS APPELLEE IS AN "ENEMY" WITHIN THE ACT AND MAY NOT MAINTAIN AN ACTION UNDER SECTION 9(a).

In addition to the conditions imposed by Congress in Section 33 on the time for suits to recover vested property, it has imposed a personal qualification for plaintiffs. By the language of Section 9(a) a plaintiff under that Section must not be an "enemy", and a plaintiff must bring himself within this "negative characterization" in order to give the court jurisdiction. *Albert v. Brownell,* 219 F. 2d 602 (C.A. 9); *Garvin v. Kogler,* 272 Fed. 442, 444 (C.A. 3). In a Section 9(a) suit the burden of proof is on the plain-

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[15]Two minor issues may be briefly noted. The "finding" of the District Court (R. 33, and see R. 30) that the action had not been commenced after the time limited by Section 33 was contrary to the facts of record and those pleaded in the amended complaint (R. 5, 6) and was clearly erroneous.

In the District Court, the appellee relied upon Section 8 of the Trading with the Enemy Act (*infra,* p. iii) as affecting the application of the period of limitations. Section 8 was part of the original Act of 1917 and cannot be read as affecting Section 33, as passed in 1946 and 1948. Also, its subject matter is not suits against the United States, but contracts containing promises to pay, evidenced by commercial paper drawn against or secured by funds or property situated in enemy territory.

tiff. *Von Zedtwitz v. Sutherland,* 26 F. 2d 525, 526 (C.A.D.C.); *Beck v. Clark,* 88 F. Supp. 565, 568 (Conn.), affirmed, 182 F. 2d 315 (C.A. 2).

"Enemy" is defined in Section 2(a) (*infra,* p. i) of the Act as: A person "of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war"; and 2(b) an "officer, official, agent" of a government of a nation with which the United States is at war. On the evidence appellee came within both of these parts of the definition. The District Court, however, held that he came within neither.

A. Appellee was an "enemy" as an individual "resident within" Japan during the war.

The District Court based its holding that appellee was not an enemy in part on a finding that he was not physically present in Japan from September 9, 1945 to December 4, 1948, and that he was not "resident within" Japan during that period or on the date of the Vesting Order, December 9, 1947 (R. 32). Except for that the Court made no finding as to residence, although it did find that the appellee lived in Japan from 1924 until his entry into the army in 1938 (R. 31).

A finding of fact is "clearly erroneous" if it is contrary to the uncontradicted and credible evidence (*Grace Bros. v. Commissioner of Internal Revenue,* 173 F. 2d 170, 174 (C.A. 9)), and a finding is not binding under Rule 52(a) (Federal Rules of Civil Procedure) if it is based upon or induced by an erroneous theory

of the applicable law. *United States v. Griffith,* 334 U.S. 100, 109; *Anderson v. Federal Cartridge Corporation,* 156 F. 2d 681, 684 (C.A. 8). In the present case appellee's own uncontradicted testimony was that his home—that is, his domicile—was in Japan. The District Court erred in disregarding that evidence; and in determining whether he was "resident within" Japan it applied an erroneous theory as to the meaning of "resident" and as to when he had to be "resident".

In *Guessefeldt v. McGrath,* 342 U.S. 308, the Court said that "resident within", as used in the Act, implies "something more than mere physical presence and something less than domicile", and that it does not include prisoners of war, expeditionary forces and "sojourners" (pp. 311-312). In *Guessefeldt,* however, the Court was only concerned with the question of when a person physically present in enemy territory is and is not "resident". On the allegations of his complaint Guessefeldt was physically present in Germany, but he claimed that he was not "resident" because he would not have remained there if he had not been constrained. On the facts of that case the Court had no occasion to consider whether a person could be "resident within" enemy territory at a time when he was not physically present or was temporarily absent therefrom.

There is authority under the Act for the view that a citizen of the United States domiciled in enemy territory is "resident within" and an "enemy". In *re Territo,* 156 F. 2d 142, 145 (C.A. 9); *Kahn v. Garvan,*

263 Fed. 909, 915 (S.D.N.Y.). Nothing in the language of the Supreme Court in *Guessefeldt* seems to impair the authority of those statements. Domicile generally means "home". Beale, *The Conflict of Laws* (1935), Vol. I, p. 109, quoted in *Ecker v. Atlantic Refining Company,* 222 F. 2d 618, 621 (C.A. 4), certiorari denied, 350 U.S. 847. On the record appellee's home, even when he was a prisoner in Siberia, was in Japan (R. 43, 53, 57-58, 69-70, 73). One reason for the Section 2 definition of a "resident" as an enemy is that when a person is living in enemy territory he is subject to the enemy's power, and so is his property, and because of that fact it is made subject to seizure. *Kahn v. Garvan,* 263 Fed. 909, 915 (S.D.N.Y.). Appellee was domiciled in Japan, and when physically absent from that country from 1938 to 1945 on military service in Manchuria, he was as much subject to the power of the Japanese Government as if he had remained at home, and to hold him "resident" is within the reason of the statute. A purpose of the Section 2 definition being to subject to seizure the property of persons who are within the enemy's power, that purpose is furthered by holding appellee, who was domiciled in Japan and subject to its authority even when in Manchuria, to be a "resident". That is the way in which "resident" in a statute should be construed. *McGrath v. Kristensen,* 340 U.S. 162, 175.[16]

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[16]Section 2 is to be read, however, to except those transients and sojourners who are constrained to remain in enemy territory, as well as "prisoners of war, expeditionary forces". *Guessefeldt v. McGrath,* 342 U.S. 308, 311-312. The terms quoted obviously refer to Americans who become prisoners of the enemy and American expeditionary forces, and do not aid the appellee.

The effect of the District Court's holding, on the other hand, would be that no domiciled Japanese who was on foreign service after the United States entered the war would be an enemy. The Court cited *Public Adm'r of New York County v. Brownell,* 115 F. Supp. 139 (S.D.N.Y.), in which the court seems to have held, citing *Guessefeldt,* that a person who was at all relevant times present in enemy or enemy-occupied territory, and who was domiciled in an enemy-occupied country, may not have been "resident within" any of those places.[17] But, as we have indicated, the Court in *Guessefeldt* did not have to consider the situation of a person who was domiciled in an enemy country but physically in a different but enemy-occupied country, and it does not follow from the fact that a person may be "resident" without being domiciled that a person domiciled is not "resident".[18]

Since the appellee's home, his domicile, was in Japan in December, 1947, when the property was vested, he was at that time "resident within" and an enemy. The District Court, however, seems to have

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[17]The decision was a denial of a motion for summary judgment, which was not appealable.

[18]In the court below the appellee argued that in 1947, when the property was vested, it was not subject to the power of Japan. But it had been so subject up to the date of his capture in 1945, and the language of the Act does not make the application of the definition depend upon whether the property is actually subject to the enemy's power at the time. The suggestion in *Josephberg v. Markham,* 152 F. 2d 644, 648 (C.A. 2), that the court may examine the necessity for vesting has not been followed. The general rule is that the decision whether to vest is a matter of executive discretion. *Clark v. Allen,* 331 U.S. 503, 511; *Codray v. Brownell,* 207 F. 2d 610, 615 (C.A.D.C.), certiorari denied, 347 U.S. 903; *Orme v. Northern Trust Co.,* 410 Ill. 354, 102 N.E. 2d 335, 339, certiorari denied, *sub nom. von Hardenberg v. McGrath,* 343 U.S. 921.

been of the opinion that the appellee was not then an "enemy" because he was not at that date in Japan (R. 32). As we have already indicated, the Supreme Court's decision in *Guessefeldt* does not require that result, and there is nothing in Section 2 to require that a person be physically in enemy territory on the exact date of vesting. To make the correctness of a vesting and a party's capacity to sue depend upon a physical absence of perhaps one day would render the seizure of enemy property a matter of chance and caprice. The better rule seems to be that once enemy status has attached it is not thereafter lost by a change in the activities or the location of the individual.[19] In *Swiss Nat. Ins. Co. v. Miller,* 289 Fed. 571 (C.A.D.C.), the Court said:

> It would have been useless to seize enemy-owned property if the owner could recover it immediately by the simple expedient of changing his residence or his place of business. [p. 573]

The Supreme Court affirmed, saying that the term 'enemy" as used in the Act "refers to the person who . . fulfilled the definition of an enemy during the war". *Swiss Ins. Co. v. Miller,* 267 U.S. 42, 45.[20]

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[19]This is different from the rule of prize law, which does not deal with the seizure of property on land, but only of property engaged in unlawful trade, that is, belonging to or destined for a person actually in enemy territory. See, *The Sally,* 8 Cr. 382, 384; *The Rapid,* 8 Cr. 155, 162, 163.

[20]And in *Behn, Meyer & Co. v. Miller,* 266 U.S. 451, 471, the Court said, "We think that subsection (a) of §9 gives now, as the same words gave from the first, the right of recovery to any person *never* 'an enemy or ally of enemy', within the statutory definitions" (Italics added).

More recently, in *Hansen v. Brownell,* 132 F. Supp. 47 (D.C.D.C.), the plaintiff lived in Germany from 1939 until 1948, when he left that country, and his property was not vested until 1951. The Court held that his removal from Germany did not change his enemy status, saying:

> The fact that he subsequently left Germany and went to France does not help him. Actual hostilities had ceased, it is true, but the war had not officially, and he was still an enemy alien. [p. 48]

On appeal the Court of Appeals affirmed, without reference to the question of residence, on the ground the plaintiff's status as enemy because he had acted as an enemy "agent" continued throughout the war, although the activities which made him an agent ceased in 1945. *Hansen v. Brownell,* 234 F. 2d 60 (C.A.D.C.).

The Court of Appeals in *Hansen* cited *Sarthou v. Clark,* 78 F. Supp. 139 (S.D. Cal.), in which the plaintiff's decedent, von Neindorff, acted as a German spy in 1942. His property, however, was not vested until 1943 and 1944, when he was on longer a spy; nevertheless, the Court held that von Neindorff having been an "enemy" in 1942, his executor could not recover.[21]

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[21]In *Sarthou* the Court stated the question for decision thus: "Was Paul von Neindorff an officer, official or agent of the Government of Germany at any time between December 11, 1941, the date of the Axis declaration of war against the United States, and November 15, 1944, the date of the death of Paul von Neindorff?" (p. 142).

In *Sarthou* the Court also passed on the question of "resident within" saying that, "It is a habitation having domiciliary properties" (p. 142). In that respect the *Sarthou* opinion does not appear necessarily to have been overruled by *Guessefeldt v. McGrath,* 342 U.S. 308, for the reasons we have indicated.

The Court of Appeals in *Hansen* suggested as a reason for the persistence of enemy status that a purpose of the Act was to "reach assets of one who has acted for the enemy, and to make them available to assist in meeting the cost of war. See *Propper v. Clark,* 337 U.S. 472, 484." That harks back to the early case of *Ware v. Hylton,* 3 Dall. 199, 227, which said that one purpose of the seizure of enemy property is "to reimburse the expense of an unjust war". And if enemy status caused by acting for the enemy persists after such action has ceased, there is no reason why enemy status caused by residence should not also last as long as the state of war continues.[22] Nothing in the language of Section 2 suggests any distinction between "resident" and "agent" as to the application in point of time of enemy status, and if a person who was an "agent" in 1945 is still to be treated as an "enemy" in 1951 for purposes of the seizure of his property, the same would seem to be true of a "resident".

That the appellee may have formed in 1932 or 1938 a vague intention to return to the United States at some time in the indefinite future did not render him any the less a "resident" of Japan. Residence once acquired continues until it is actually given up; "A mere floating intention, indefinite as to time, to return" is not enough. *Commissioner of Internal Reve-*

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[22]So to hold accords with the principle that the status of enemy-owned property may not be changed during the war. See, *Propper v. Clark,* 337 U.S. 472; *Miller v. Schutte,* 287 Fed. 604, 607, appeal dismissed, 263 U.S. 730; *Schrijver v. Sutherland,* 19 F. 2d 688, certiorari denied, 275 U.S. 546.

nue v. Nubar, 185 F. 2d 584, 587 (C.A. 4), certiorari denied, 341 U.S. 925.

That the appellee was a citizen of the United States does not change the result. Section 2 applies to an individual "of any nationality" and the courts have uniformly held that that comprehends citizens of the United States. *United States v. Krepper,* 159 F. 2d 958, 966 (C.A. 3), certiorari denied, 330 U.S. 824; *Josephberg v. Markham,* 152 F. 2d 644, 648 (C.A. 2); *Salvoni v. Pilson,* 181 F. 2d 615, 617 (C.A.D.C.), certiorari denied, 339 U.S. 981; *Miyuki Okihara v. Clark,* 71 F. Supp. 319, 322 (Hawaii); *Duisberg v. United States,* 89 F. Supp. 1019, 1022 (Ct. Cl.), certiorari denied, 340 U.S. 890. And the Supreme Court has held that to treat as enemies citizens of the United States who reside in enemy territory or who act for the enemy is within the Constitution. *Miller v. United States,* 11 Wall. 268, 305-306; *Ex parte Quirin,* 317 U.S. 1, 37. And see, *In re Territo, supra.*

Whether the appellee would have been "resident within" Japan for purposes of the Act if it were a question only of the period after his capture in 1945, it is unnecessary to decide, although he continued to be domiciled in Japan. He was, however, a person "resident within" Japan from December 7, 1941, until his capture, so he was still an "enemy" in 1947 when his property was vested and in 1950 when he brought this suit.

B. As an "officer" of the Japanese Government appellee was an "enemy".

It is admitted that the appellee was a commissioned officer in the medical corps of the Japanese army from December 15, 1938, on (R. 125). As such he was, after December 7, 1941, within the literal terms of Section 2(b), which includes in the definition of "enemy", the government of any nation with which the United States is at war or "any officer, official, agent" thereof. That is to be expected in a war statute; in war the opponent's military leaders are "enemies" if anyone is.[23] The District Court, however, found that the appellee's service in the Japanese army was in obedience to the laws of Japan, of which he was a national, and that after the commencement of the war between the United States and Japan such service was involuntary. It held that appellee was not an "officer, official or agent" of Japan (R. 32).

There is nothing to show that appellee's service in the Japanese army after December 7, 1941, was less or more "voluntary" than in the period 1938-1941, and there is no evidence that the entry of the United States into the war changed in any degree the character of his military service or the relation in which he stood to the Japanese Government or army or that it affected in any way his attitude or state of mind. The only difference of any kind shown in the record between appellee's pre- and post-Pearl Harbor mili-

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[23]The decisions to date under Section 2(b) have dealt with the term "agent", holding that spies and propagandists are within that term. *Sarthou v. Clark*, 78 F. Supp. 139 (S.D. Calif.); *Hansen v. Brownell*, 132 F. Supp. 47 (D.C.D.C.), affirmed, 234 F. 2d 60.

tary career is that on March 10, 1942, he was promoted to the rank of Captain (R. 125).

On the record the fact that the appellee was a citizen of the United States as well as of Japan had nothing to do with the voluntariness or involuntariness of his army service. During the period 1932 to 1945 he never asserted or claimed his American citizenship and never made it known in any way to either the Japanese or the United States authorities. As far as the facts in the record go, appellee acted just as if he had had only Japanese citizenship and that was the way the Japanese Government treated him. In 1932 he was any Japanese youth of twenty getting a deferment from military service to pursue his medical studies; in 1938 he was any Japanese of twenty-six who had completed his medical school course and chose to serve in the army as a medical officer. Not only is there no evidence that there was any connection between his United States citizenship and the "voluntariness" or not of his military service, it is also the fact that there is no evidence of any threats, any "putting in fear", any actual coercion to make him serve. What the appellee did he did not do under duress. Cf. *Iva Ikuko Toguri d'Aquino v. United States,* 192 F. 2d 338, 359, 360-362 (C.A. 9), certiorari denied, 343 U.S. 935.

It seems that the correctness of the District Court's finding that his military service (after December 8, 1941) was involuntary must rest on the premise that appellee's original entry into the Japanese army in October, 1938, was involuntary because it was in

obedience to the Japanese laws for compulsory military service. But to hold that the service of any enemy officer who entered the armed forces through operation of a draft law was "involuntary" in such sense as to take him out from under Section 2(b), which contains in its language no exception, would drive a hole through the Act large enough to exempt practically all of the Axis armies. Certainly in 1917 when Congress enacted the Trading with the Enemy Act, six months after the declaration of war on Germany, it knew that many of the countries of the world recruited their armies by conscription, and it must have chosen the language of Section 2(b) with that fact in mind.[24] That it meant to include in the term "officer" only those who had volunteered is extremely unlikely. See, *Acheson v. Maenza,* 202 F. 2d 453, 456 (C.A.D.C.); *Minoru Hamamoto v. Acheson,* 98 F. Supp. 904 (S.D. Calif.).

Assuming *arguendo* that "involuntary" service as a commissioned officer may take a man out from under Section 2(b), a reasonable rule, and one that this Court and others have applied in the somewhat analogous situation presented by the expatriation cases, is that the mere fact of induction pursuant to a conscription law is not enough by itself to make the service "involuntary". There must be an inquiry into all the circumstances, whether there was any resistance to or protest against induction, any attempt to escape service, any threats or actual duress in

[24]See the list of countries which had conscription in 1917 set out in the footnote to the opinion in the *Selective Draft Law Cases,* 245 U.S. 366, 378.

the sense of putting into fear. The mere fact that appellee entered the Japanese army because he understood that the law required him to do so is not enough. See, *Coumas v. Brownell,* 222 F. 2d 331, 332 (C.A. 9); *Acheson v. Maenza, supra; Minoru Hamamoto v. Acheson, supra; Toshio Kondo v. Acheson,* 98 F. Supp. 884 (S.D. Calif.). And cf. *Iva Ikuko Toguri d'Aquino v. United States,* 192 F. 2d 338,, 359 (C.A. 9), certiorari denied, 343 U.S. 935.

On the facts appellee's military service was voluntary; there was no protest, no attempt to get out of serving. Moreover, whatever appellee's obligation to serve in the army was under the Japanese law, there was no obligation on him to become an officer. That was his own free and willing choice; he chose to serve the Emperor as an officer because he had been allowed to complete his medical education without interruption and because to do so would be to his advantage (R. 75-76, 161). When he chose to become an officer he was twenty-six years old and knew what he was doing. Even in the cases dealing with expatriation the courts have said that the conscript who offers to undertake more responsible or onerous duties than those required by law is to be held to have done so voluntarily. See, *Augello v. Dulles,* 220 F. 2d 344, 347 (C.A. 2); *Toshio Kondo v. Acheson,* 98 F. Supp. 884, 887 (S.D. Calif.).[25] In *Hansen v. Brownell,* 132 F. Supp. 47 (D.C.D.C.), affirmed, 234 F. 2d 60

[25]That appellee could not do exactly what he wanted to do would not make what he chose to do involuntary. See, *United States v. Watkins,* 171 F. 2d 431, 432 (C.A. 2), certiorari denied, 337 U.S. 914.

(C.A.D.C.), a man who chose to serve Germany as a propagandist as an alternative to compulsory army service was held to have done so voluntarily. And see, *Kawakita v. United States,* 343 U.S. 717, 735.

It must be noted, moreover, that this is not an expatriation case, in which the Government must prove his intent to give up his citizenship by "clear, unequivocal, and convincing" evidence. *Soccodato v. Dulles,* 226 F. 2d 243, 246 (C.A.D.C.). Citizenship is not in issue here; it was stipulated in the District Court that no claim was made that appellee had lost his American citizenship (R. 39). Even as an American citizen the appellee can be an "enemy" within the Act (*supra,* p. 28), and he certainly could stand no better because he has dual citizenship.

Even as a medical officer, appellee was still an "officer" of the Japanese Government, and the language of Section 2(b) draws no distinction. In *Vowinckel v. First Federal Trust Co.,* 10 F. 2d 19 (C.A. 9), this Court, citing the Geneva Convention (35 Stat. 1885), held that a Red Cross surgeon was not an "enemy" within the Act. But Vowinckel seems to have been an officer of the German Red Cross and not of the German Government, and such exemption as might be accorded an officer of the Red Cross engaged "in alleviating the sufferings of mankind in general" should not, it is submitted, be extended to a Captain in the First Imperial Guards. As an officer of the Japanese Government the appellee was within the language of Section 2(b) and was an "enemy". And, since he was an officer from December 7, 1941,

at least until his capture in 1945, he was still an "enemy" when the property was vested in 1947. *Hansen v. Brownell,* 234 F. 2d 60 (C.A.D.C.).

CONCLUSION.

For the reasons stated the judgment of the District Court should be set aside and the action should be remanded with directions to dismiss the complaint for lack of jurisdiction.

Respectfully submitted,

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(Appendix Follows.)

Appendix.

Appendix

TRADING WITH THE ENEMY ACT, AS AMENDED

(40 Stat. 411, 50 U.S.C. App. §1, et seq.).

* * *

SEC. 2. That the word "enemy," as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.

* * *

The words "the beginning of the war," as used herein, shall be deemed to mean midnight ending the day on which Congress has declared or shall declare war or the existence of a state of war.

The words "end of the war," as used herein, shall be deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace, unless

the President shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be the "end of the war" within the meaning of this Act.

* * *

SEC. 7. . . .

(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, or on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

* * *

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the

Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

* * *

SEC. 8. . . .

(c) The running of any statute of limitations shall be suspended with reference to the rights or remedies on any contract or obligation entered into prior to the beginning of the war between parties neither of whom is an enemy or ally of enemy, and containing any promise to pay or liability for payment which is evidenced by drafts or other commercial paper drawn against or secured by funds or other property situated in an enemy or ally of enemy country, and no suit shall be maintained on any such contract or obligation in any court within the United States until after the end of the war, or until the said funds or property shall be released for the payment or satisfaction of such contract or obligation: *Provided, however,* That nothing herein contained shall be construed to prevent the suspension of the running of the statute of limitations in all other cases where such suspension would occur under existing law.

SEC. 9. (a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the

United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case

may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * *

SEC. 32. (a) The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, whenever the President or such officer or agency shall determine—

(1) that the person who has filed a notice of claim for return, in such form as the President

or such officer or agency may prescribe, was the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian, or is the legal representative (whether or not appointed by a court in the United States), or successor in interest by inheritance, devise, bequest, or operation of law, of such owner; and

(2) that such owner, and legal representative or successor in interest, if any, are not—

* * *

(D) an individual who was at any time after December 7, 1941, a citizen or subject of Germany, Japan, Bulgaria, Hungary, or Rumania, and who on or after December 7, 1941, and prior to the date of the enactment of this section, was present (other than in the service of the United States) in the territory of such nation or in any territory occupied by the military or naval forces thereof or engaged in any business in any such territory: *Provided,* That notwithstanding the provisions of this subdivision (D) return may be made to an individual who, as a consequence of any law, decree, or regulation of the nation of which he was then a citizen or subject, discriminating against political, racial, or religious groups, has at no time between December 7, 1941, and the time when such law, decree, or regulation

was abrogated, enjoyed full rights of citizenship under the law of such nation: *And provided further,* That notwithstanding the provisions of subdivision (C) hereof and of this subdivision (D), return may be made to an individual who at all times since December 7, 1941, was a citizen of the United States, or to an individual who, having lost United States citizenship solely by reason of marriage to a citizen or subject of a foreign country, reacquired such citizenship prior to the date of enactment of this proviso if such individual would have been a citizen of the United States at all times since December 7, 1941, but for such marriage: *And provided further,* That the aggregate book value of returns made pursuant to the foregoing proviso shall not exceed $9,000,000; and any return under such proviso may be made if the book value of any such return, taken together with the aggregate book value of returns already made under such proviso does not exceed $9,000,000; and for the purposes of this proviso the term "book value" means the value, as of the time of vesting, entered on the books of the Alien Property Custodian for the purpose of accounting for the property or interest involved; . . .

* * *

SEC. 33.[24] No return may be made pursuant to section 9 or 32 unless notice of claim has been filed: (a) in the case of any property or interest acquired by the United States prior to December 18, 1941, by August 9, 1948; or (b) in the case of any property or interest acquired by the United States on or after December 18, 1941, not later than one year from the enactment of this amendment, or two years from the vesting of the property or interest in respect of which the claim is made, whichever is later; except that return may be made to a successor organization designated pursuant to section 32(h) hereof if notice of claim is filed before the expiration of one year from the effective date of this Act. No suit pursuant to section 9 may be instituted after April 30, 1949, or after the expiration of two years from the date of the seizure by or vesting in the Alien Property Custodian, as the case may be, of the property or interest in respect of which relief is sought, whichever is later, but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9 or 32(a) hereof.

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[24]Section 33 added by Public Law 671, 79th Cong., approved August 8, 1946 (60 Stat. 925). Amended by Public Law 370, 80th Cong., approved August 5, 1947 (61 Stat. 784), by Public Law 874, 80th Cong., approved July 1, 1948 (62 Stat. 1218), by Public Law 292, 83d Cong., approved February 9, 1954 (68 Stat. 7), and by Public Law 626, 83d Cong., approved August 23, 1954 (68 Stat. 767).

SEC. 39. (a) No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein. The net proceeds remaining upon the completion of administration, liquidation, and disposition pursuant to the provisions of this Act of any such property or interest therein shall be covered into the Treasury at the earliest practicable date. Nothing in this section shall be construed to repeal or otherwise affect the operation of the provisions of section 32 of this Act or of the Philippine Property Act of 1946.

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